Tan Lay Chen v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–21 OF 2000
AUGUSTINE PAUL J
19 SEPTEMBER 2000

Criminal Procedure *— Report or certificate — Chemist report served on day accused pleaded guilty — Whether prosecution must comply with ten-day rule in s 399(1) Criminal Procedure Code — Whether tender of report amount to adducing evidence by prosecution*

Criminal Procedure *— Sentence — Principles of sentencing — Facts could support charge for more serious offence, whether relevant consideration — Consideration of guilty plea and clean record of accused not apparent from grounds of judgment, whether misdirection of law — What sentence should be reduced*

The accused was charged with being in possession of 3.9g of heroin and 33.2g of monoacetylmorphines under s 12(2) of the Dangerous Drugs Act 1952 and punishable under s 39A(2) of the same Act. The accused pleaded guilty to the charge. The sessions court judge imposed a sentence of 12 years imprisonment and ten strokes of the rotan. The sessions court judge proceeded on the basis that as the weight of the dangerous drugs could have invited a charge for trafficking, the fact that the accused was only charged for possession justified a sentence that reflected the seriousness of the offence. The accused appealed against the sentence imposed. It was submitted: (i) the sessions court judge had not considered the fact that the accused had no previous convictions and that he had pleaded guilty; and (ii) the chemist report was served on the accused only on the day he pleaded guilty, contravening s 399(1) of the Criminal Procedure Code.

Held, varying the sentence of imprisonment to eight years:

(1) The sessions court judge had committed a grave misdirection of law. A person should be sentenced only upon a consideration of the penalty prescribed for the offence in respect of which he has been found guilty without being influenced by a more serious offence that the facts of the case may reveal. Such influence may aggravate the proper sentence to be imposed (see p 140A–B).

(2) A guilty plea and clean record of the accused are matters that must be taken into consideration before sentence is passed as they have been traditionally recognized as substantial grounds of mitigation. If a sentence is imposed without taking into consideration a guilty plea, then the reasons for such departure must be explained. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of the case, be considered as a mitigating factor. Failure to do so will lead to criticism, as in this case, that the plea has not been taken into account in imposing sentence. In this case, the sessions court judge had not

explained why he had disregarded the guilty plea, and, by the same process of reasoning, the clean record of the accused. This was a misdirection of law (see pp 140B, H–141A).

(3) As the sessions court judge had erred in law, the sentence ought to be reviewed. No cogent reasons were advanced by the deputy public prosecutor as to why the clean record of the accused and the fact that he had pleaded guilty should not be considered in his favour. Having considered these facts against the background of the element of public interest to be served, a sentence of eight years imprisonment would be appropriate (see p 143A–B).

(4) The proviso to s 399(1) of the Criminal Procedure Code becomes applicable only in a case where the Public Prosecutor ' … intends to give in evidence …' any report. Section 399(1) would thus apply where a person pleads guilty only if the procedure following such a plea involves the taking of evidence. Following a guilty plea, the prosecution is only required to give a summary of facts of the case. This does not require the facts of the case to be proved by calling evidence. On the facts of the case, the chemist report can be proved with ease by calling the chemist if the need arises. Therefore there was no necessity to comply with the ten-day rule in s 399(1) of the CPC following a guilty plea as there is no requirement to adduce any evidence at that stage (see pp 141D, 142H, 143A–B).

[**Bahasa Malaysia summary**

Tertuduh telah dituduh mempunyai dalam milikannya 3.9g dadah heroin dan 33.2g monoacetylmorphine di bawah s 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39A(2) Akta yang sama. Tertuduh telah mengaku bersalah kepada pertuduhan tersebut. Hakim mahkamah sesyen telah menjatuhkan hukuman pemenjaraan selama 12 tahun dan sepuluh sebatan rotan. Hakim mahkamah sesyen meneruskan atas dasar bahawa oleh kerana berat dadah berbahaya itu boleh membawa satu pertuduhan mengedar, fakta bahawa tertuduh telah hanya dituduh bagi pemilikan mewajarkan satu hukuman yang menggambarkan sifat serius kesalahan tersebut. Tertuduh merayu terhadap hukuman yang dikenakan. Adalah dihujahkan: (i) hakim mahkamah sesyen telah tidak mempertimbangkan fakta bahawa tertuduh tidak mempunyai sebarang sabitan yang lalu dan bahawa beliau telah mengaku bersalah; dan (ii) laporan ahli kimia telah disampaikan kepada tertuduh hanya pada hari beliau mengaku bersalah, yang melanggari s 399(1) Kanun Prosedur Jenayah.

Diputuskan:

(1) Hakim mahkamah sesyen telah melakukan satu salah arahan undang-undang yang amat serius. Seseorang haruslah dihukum

hanya setelah mempertimbangkan penalti yang ditetapkan untuk kesalahan tersebut berhubung dengan yang mana beliau telah didapati bersalah tanpa dipengaruhi oleh kesalahan yang lebih serius yang fakta-fakta kes tersebut boleh dedahkan. Pengaruh yang sedemikian mungkin menjadikan hukuman sewajarnya yang akan dikenakan lebih berat (lihat ms 140A–B).

(2) Rayuan bersalah dan rekod bersih tertuduh merupakan perkara-perkara yang harus dipertimbangkan sebelum hukuman dijatuhkan memandangkan ini adalah mengikut tradisi yang diiktirafkan sebagai alasan-alasan mitigasi yang substansial. Jika sesuatu hukuman dijatuhkan tanpa mempertimbangkan rayuan bersalah, maka alasan-alasan bagi peninggalan yang sedemikian mestilah diperjelaskan. Alasan penghakiman mestilah dengan itu menunjukkan mengapa pengakuan bersalah tersebut tidak boleh, berdasarkan fakta-fakta kes itu, dipertimbangtkan sebagai faktor mitigasi. Kegagalan berbuat demikian akan membawa kepada kritikan, seperti mana dalam kes ini, bahawa pengakuan tersebut belum diambil kira dalam menjatuhkan hukuman. Dalam kes ini, hakim mahkamah sesyen belum memperjelaskan mengapa beliau telah tidak menghiraukan pengakuan bersalah tersebut, dan, melalui proses alasan yang sama, rekod bersih tertuduh tersebut. Ini merupakan satu salah-nyataan undang-undang (lihat ms 140B, H–141A).

(3) Oleh kerana hakim mahkamah sesyen telah khilaf pertimbangan di sisi undang-undang, hukuman tersebut haruslah dikaji semula. Tiada alasan-alasan yang meyakinkan telah dikemukakan oleh penolong pendakwa raya berhubung dengan mengapa rekod bersih tertuduh dan hakikat bahawa beliau telah mengaku bersalah tidak seharusnya dipertimbangkan untuk memihak kepadanya. Setelah mempertimbangkan fakta-fakta ini dengan latarbelakang unsur yang akan menjadi kepentingan awam, satu hukuman pemenjaraan selama lapan tahun adalah berpatutan (lihat ms 143B–C).

(4) Proviso kepada s 399(1) Kanun Prosedur Jenayah menjadi boleh dipakai hanya dalam sesuatu kes di mana Pendakwa Raya '… bertujuan untuk memberi dalam keterangan …' sebarang laporan. Seksyen 399(1) Kanun Prosedur Jenayah akan dengan itu menjadi terpakai di mana seseorang mengaku bersalah hanya jika prosedur selepas pengakuan yang sedemikian melibatkan pengambilan keterangan. Berikutan dengan pengakuan bersalah, pihak pendakwaan hanya dikehendaki untuk memberikan satu ringkasan fakta kes tersebut. Ini tidak memerlukan fakta-fakta kes tersebut dibuktikan dengan meminta keterangan. Berdasarkan fakta-fakta kes tersebut, laporan ahli kimia boleh dibuktikan dengan mudahnya dengan memanggil ahli kimia tersebut jika diperlukan. Oleh itu adalah tidak perlu untuk mematuhi kaedah sepuluh-hari di dalam s 399(1) Kanun Prosedur Jenayah berikutan dengan satu pegakuan bersalah kerana tidak terdapat

syarat untuk mengemukakan sebarang keterangan di peringkat itu (lihat ms 141D, 142H, 143A–B).]

Notes

For cases on report or certificate generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2322–2357.

For cases on principles of sentencing, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2904–2971.

Cases referred to

Chang Cheng Hoe & Ors, Re [1966] 2 MLJ 252 (refd)
Eng Song Hai v PP [1954] MLJ 38 (refd)
Hajar bte Ishak v Pendakwa Raya [2000] 3 AMR 3510 (refd)
Lee Say & Ors v PP [1985] 2 CLJ 155 (refd)
Lee Weng Tuck v PP [1989] 2 MLJ 143 (refd)
Loh Hock Seng v PP [1980] 2 MLJ 13 (refd)
Mohammad bin Hassan v PP [1998] 5 MLJ 65 (refd)
Philip Lau Chee Heng v PP [1988] 3 MLJ 107 (refd)
PP v Govindnan a/l Chinden Nair [1998] 2 MLJ 181 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Leng Chow Teng [1985] 1 MLJ 229 (refd)
PP v Oo Leng Swee & Ors [1981] 1 MLJ 247 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
R v Costen (1989) 11 Cr App R (S) 182 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Sim Gek Yong v PP [1995] 1 SLR 537 (refd)
Zaidon Shariff v PP [1996] 4 CLJ 441 (refd)

Legislation referred to

Criminal Procedure Code ss 173(b), (m)(ii), 399(1)
Dangerous Drugs Act 1952 ss 12(2), 39A(2)

Kuldip Singh (*Kuldip Singh & Associates*) for the appellant.

Lukamn bin Zainuddin (Attorney General's Chambers) for the respondent.

Augustine Paul J. : The accused in this case was charged with being in possession of 3.9g of heroin and 33.2g of monoacetyl-morphines under s 12(2) of the Dangerous Drugs Act 1952 and punishable under s 39A(2) of the same Act. On 6 June 2000 he pleaded guilty to the charge. The learned sessions court judge convicted the accused and imposed a sentence of 12 years imprisonment and ten strokes of the rotan. This appeal is by the accused against the sentence imposed.

The facts of the case outlined by the prosecution revealed that on 6 August 1999 the complainant Inspector Haslah bte Bachok together with

a police party raided premises number Lot 626, Batu 5, Jalan Gombak. The police searched the premises in the presence of the accused and recovered a blue bag. The bag contained several packets suspected to contain dangerous drugs. The accused admitted that the packets belonged to him. The packets were later sent to the chemist for analysis who confirmed that it contained dangerous drugs as specified in the charge. The accused admitted the facts and the learned sessions court judge accepted the guilty plea. In his plea in mitigation the accused prayed for leniency. He said that he has to support his young child and his mother aged 50. His father had passed away. The learned deputy public prosecutor prayed for a deterrent sentence as the offence is serious. In explaining the reasons for imposing the sentence the learned sessions court judge said in his grounds of judgment as follows:

> Semasa menjatuhkan hukuman saya telah mengambil kira perkara berikut:
>
> Jumlah dadah yang dirampas adalah banyak dan jika berat dadah itu diambil kira tertuduh sepatutnya boleh dituduh untuk kesalahan pengedaran dadah yang membawa hukuman mati. Memandangkan tertuduh hanya dituduh atas tuduhan pemilikan adalah tanggungjawab mahkamah untuk memberi satu hukuman yang mencerminkan 'seriousness of the offence'. Oleh itu satu hukuman penjara yang panjang adalah amat sesuai bagi kes ini.
>
> Selain dari itu saya telah menimbangkan hujah pendakwa bahawa kesalahan penyalah-gunaan dadah adalah sangat berleluasa. Bagi saya satu hukuman yang berat dapat menjadi satu pengajaran kepada orang ramai supaya tidak terjebak dalam gejala ini.
>
> Seterusnya rayuan tertuduh mengenai 'family hardship' tidak seharusnya diambil kira memandangkan tertuduh adalah seorang yang matang dan sepatutnya telah berfikir tentang keluarganya sebelum melakukan kesalahan ini. Saya juga mendapati tertuduh tidak menunjukkan apa-apa kekesalan atas perbuatannya.
>
> Berdasarkan faktor-faktor di atas saya berpendapat hukuman 12 tahun penjara dan sebatan sepuluh kali adalah setimpal dengan kesalahan yang dilakukan oleh tertuduh.

In his argument before me learned counsel for the accused said that the grounds of the learned sessions court judge does not show that he has considered the facts that the accused has no previous convictions and that he had pleaded guilty. Learned counsel also added that the chemist report was served on the accused only on the day he pleaded guilty. This, learned counsel said, appears to conflict with the recent judgment of the High Court in *Hajar bte Ishak v Pendakwa Raya* [2000] 3 AMR 3510 where it was held that a chemist report must be served ten days prior to the trial as required by s 399(1) of the Criminal Procedure Code ('CPC') even when the accused had pleaded guilty. Learned counsel did however say that though he is raising the objection he finds it difficult to support the judgment relied on by him. The learned deputy public prosecutor said that as drug offences are serious the sentence imposed is reasonable.

I shall first deal with the objection raised by learned counsel with regard to the mitigating factors relied on by him. The learned sessions court judge has proceeded on the basis that any sentence imposed must reflect the

seriousness of the offence. He said that as the weight of the dangerous drugs could have invited a charge for trafficking the fact that the accused was only charged for possession justified a sentence that reflected the seriousness of the offence. This, to my mind, is a grave misdirection in law. A person should be sentenced only upon a consideration of the penalty prescribed for the offence in respect of which he has been found guilty without being influenced by a more serious offence that the facts of the case may reveal. Such influence may, consciously or unconsciously, aggravate the proper sentence to be imposed. This, perhaps, prevented the learned sessions court judge from considering the clean record of the accused and the fact that he had pleaded guilty. These are matters that must be taken into consideration before sentence is passed as they have been traditionally recognised as substantial grounds of mitigation. This is required by s 173(m)(ii) of the CPC which reads as follows:

> If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted thereon and the Court shall pass sentence according to law.

The phrase 'pass sentence according to law' in the subsection means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252; *PP v Jafa bin Daud* [1981] 1 MLJ 315; *Philip Lau Chee Heng v PP* [1988] 3 MLJ 107). The assessment of a sentence in accordance with judicial principles clearly contemplates, inter alia, a consideration of the mitigating circumstances in favour of the person to be sentenced. It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v PP* [1975] 2 MLJ 134; *PP v Sulaiman bin Ahmad* [1993] 1 MLJ 74; *PP v Ravindran & Ors* [1993] 1 MLJ 45). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v PP* [1996] 4 CLJ 441; *Lee Say & Ors v PP* [1985] 2 CLJ 155). The severity of the offence committed may outweigh the mitigating affect of a guilty plea (see *Loh Hock Seng v PP* [1980] 2 MLJ 13, *PP v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v PP* [1995] 1 SLR 537; *R v Costen* (1989) 11 Cr App R (S) 182). Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see *PP v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181). Be that as it may, as I said earlier it must not be overlooked that the general rule is that an accused should be given a lesser punishment for pleading guilty. There can, as I have said, be a departure from this general rule. However, there must be good reasons for doing so. In that event the reasons for such departure must be kept in mind. If, therefore, a sentence is imposed without taking into consideration a guilty plea then the reasons for doing so must be explained by the sentencer. This is because an accused person expects the general rule to operate in his favour when he pleads guilty. The grounds of judgment must therefore show why the guilty plea cannot, on the facts of

the case, be considered as a mitigating factor. Failure to do so will lead to the criticism, as in this case, that the plea has not been taken into account in imposing sentence. In this case the learned sessions court judge had not explained why he had disregarded the guilty plea, and, by the same process of reasoning, the clean record of the accused. This is a misdirection in law.

I consider it necessary to refer to *Hajar bte Ishak* referred to by learned counsel. In that case the learned trial judge, in declining to follow *Eng Song Hai v PP* [1954] MLJ 38 where it was held that it is not necessary to serve the chemist report on the accused when he pleads guilty, said that a trial shall ' … be deemed to have commenced when the accused pleads guilty and the prosecution thereafter proceeds to adduce evidence in support of the charge' (at p 3527). As the proviso to s 399(1) of the CPC provides that the report shall be served '… in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial' it was held that it applies even in instances where an accused pleads guilty as the trial is deemed to have commenced when the plea is made. With respect I am unable to agree. It must immediately be observed that the proviso to s 399(1) of the CPC becomes applicable only in a case where the Public Prosecutor ' … intends to give in evidence … ' any report. Section 399(1) would thus apply where a person pleads guilty only if the procedure following such a plea involves the taking of evidence. The procedure to be followed when a person pleads guilty is laid down in s 173(b) of the CPC. It reads as follows:

> If the accused pleads guilty to the charge whether as originally framed or as amended, the plea shall be recorded and he may be convicted thereon …
>
> Provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification, the offence alleged against him.

The proviso to the sub-section prescribes certain guidelines to be followed before a plea of guilty is recorded. The use of the words ' … shall ascertain …' in the proviso makes compliance with the guidelines mandatory (see *PP v Leng Chow Teng* [1985] 1 MLJ 229). Accordingly, the only safeguards to be adhered to following a guilty plea are, as explained in *Lee Weng Tuck v PP* [1989] 2 MLJ 143, as follows:

(i) the court must ensure that it is the accused himself who wishes to plead guilty;

(ii) the court must ascertain that the accused understands the nature and consequences of his plea; and

(iii) the court must ascertain that the accused intends to admit without qualification the offence alleged against him.

I have considered the matters referred to above in some detail in *Mohammad bin Hassan v PP* [1998] 5 MLJ 65 and it is not necessary for me to repeat them here. It is sufficient for me to merely refer to item (iii) above which deals with the manner the court must ascertain that the accused intends to

admit without qualification the offence alleged against him. As I said in *Mohammad bin Hassan* at pp 72–73:

> Thus the proviso to the subsection mandates the court to ' … ascertain …' that the requirements laid down therein have been complied with. The court can only ascertain this after being apprised of the facts of the case and it is therefore a necessary corollary of the proviso to set out an outline or a statement of the facts of the case to satisfy the stipulated requirements (see *PP v He King Kiok & Anor* [1992] 2 MLJ 781 (HC)). Its object is to ensure that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. It is designed not only to ascertain whether admission of the facts amounts to a plea of guilt in law but also to enable the court to form an opinion on the conduct of the accused in assessing the sentence (see *Palan v PP* [1932] MLJ 124 (HC); *PP v Nahat Singh* [1939] MLJ 239 (HC); *PP v Chean Tin* [1939] MLJ 266 (HC); *Tukiran bin Taib v PP* [1955] MLJ 24 (HC); *Abdul Kadir bin Abdul Rahman v PP* [1984] 1 MLJ 80 (HC); *Lian Kian Boon v PP* [1991] 1 MLJ 51 (HC); *New Tuck Shen v PP* [1982] 1 MLJ 27 (HC) and *Lee Weng Tuck v PP*). Failure to take evidence or a statement of the facts and record them will result in the conviction being quashed (see *Supramaniam v Kanthasamy* [1956] MLJ 18 (HC) and *Nadeson v PP* [1966] 1 MLJ 63 (HC)).
>
> The facts presented to the court after a plea of guilty should be a short summary of the facts of the case. The length of the narrative will depend on the nature of the charge and seriousness of the case. It is not required to be some kind of litany in which the wording of the section of the Act under which the accused has been charged should be faithfully reproduced. It should be confined to facts which the prosecution is able to prove and then only to facts necessary to establish the charge (see *Chen Chong & Ors v PP* [1967] 2 MLJ 130, *Abdul Kadir bin Abdul Rahman v PP* and *Lian Kian Boon v PP*). In simple and straightforward cases, the outline of the facts is usually done orally but in more involved cases, the outline may be in the form of a written statement (see *Mok Swee Kok v PP* [1994] 3 SLR 140 (CA)). But in cases of doubt or difficulty, it may be advisable to have evidence led as to the facts. The course adopted in each case must be left to the court's discretion (see *Chin Ban Keat v R* and *PP v Abdul Aziz* [1978] 2 MLJ 155 (HC)). A record of the facts merely as 'facts as in charge' is not sufficient as it does not indicate whether an offence is disclosed (see *Nadeson v PP* and *PP v Abdul Aziz*). It is the duty of the magistrate to defer acceptance of a plea of guilty until he has the facts alleged by the prosecution fully before him. Accordingly he should, where necessary, postpone the case to give the prosecution a reasonable opportunity of completing their inquiries and grant bail to the accused if the case is one in which it seems fitting to do so (see *PP v Yong Chin* [1952] MLJ 142 (HC)).

It will therefore be observed that following a guilty plea the prosecution is only required to give a summary of the facts of the case. This does not require the facts of the case to be proved by calling evidence. Thus as Bellamy J said in *Eng Song Hai* at pp 38–39:

> The appellant had pleaded guilty to the charge as amended, and no question then arose of the prosecution proving their case.

However, the facts given by the prosecution must be facts which it is able to prove if the necessity arises and which are essential to establish the charge. A chemist report falls within this category of facts. It is a document that the

prosecution would be able to prove if the need arises. Thus a mere tendering of the report to the court as part of the facts constituting the offence would be sufficient. On the facts of this case, and also in *Hajar bte Ishak*, the chemist report can be proved with ease by calling the chemist if the need arises. It is therefore my view that there is no necessity to comply with the ten-day rule in s 399(1) of the CPC following a guilty plea as there is no requirement to adduce any evidence at that stage.

As the learned sessions court judge had erred in law in imposing the sentence I was of the view that it ought to be reviewed. No cogent reasons were advanced to me by the learned deputy public prosecutor as to why the clean record of the accused and the fact that he had pleaded guilty should not be considered in his favour. Having considered these facts against the background of the element of public interest to be served I felt that a sentence of eight years imprisonment would be appropriate. Accordingly, I varied the sentence of imprisonment to one of eight years.

Order accordingly.

Reported by Jafisah Jaafar